80-370

Supreme Court, U. S.
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In The

Supreme Court of the United States

FRANK FARKAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

and

JEROME KURTZ, COMMISSIONER OF INTERNAL REVENUE SERVICE

and

HOWELL ELLIOTT, REVENUE AGENT

and

JAMES LOCRAFT, INTERNAL REVENUE AGENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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The above named petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion in the United States Court of Appeals for the District of Columbia circuit.

QUESTIONS PRESENTED

Can the Doctrine of Soverign immunity be used as a bar to suits against the United States for damages, when the acts complained of constitute a violation of plaintiff's constitutional and civil rights?

Was the dismissal with prejudice against the individual defendants for failure of personal service proper?

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OPINION BELOW

The opinion of the Court of Appeals (unreported) appears in the appendix. The opinion held that the United States Government is immune from Mr. Farkas' claim and further held that the dismissal of the claim against the individual defendants was valid since there was no individual service.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 4, 1980. This petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On April 11, 1979, petitioner Frank Farkas filed a complaint in the United States District Court for the District of Columbia. The complaint, filed pro se, charged that his civil and constitutional rights were denied him when certain agents of the Internal Revenue Service conspired to secure an indictment against him. The gravamen of the petitioner's complaint was that certain legitimate books and records dealing with his business and personal finances were taken from his office and despite requests from petitioner, were never returned. Subsequently, using these records and others, an indictment was returned, charging five counts of criminal tax evasion.

Subsequently, Mr. Farkas was brought to court in the United States District Court for the Eastern District of Maryland, Cr. No. K-76-0103. Appellant states that because of this lack of his books and records, he was unable to properly defend himself, and entered a plea to one count of the indictment. The plea was an *Alford* plea.

Based on these allegations, Mr. Farkas sought relief in the United States District Court for the District of Columbia. After

a written motion to dismiss was filed by the Government and the filing of an opposition to motion to dismiss, the case was dismissed. There was no testimony taken, and the order of the lower court did not contain any elaborations as to the reasons for the dismissal.

After appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the dismissal.

REASONS FOR GRANTING THE WRIT

The compelling reasons for granting this writ is the present necessity for establishing clearly the priority of rights between the United States and its aggrieved citizens. The rights of due process guaranteed under the Constitution of the United States must be ranked above a claim of governmental immunity. The effect of this claim of governmental immunity denies access to the courts. Mr. Farkas claimed that his civil and constitutional rights were grossly abridged by IRS agents.

Petitioner does not request that this Court strike soverign immunity as a defense to suits against the Government, what petitioner requests is that the Court not permit the claim of soverign immunity to prohibit claims against the Government for manifestly improper acts by its agents and employees. Legitimate governmental actions, discretionary actions, perhaps even harsh and punitive action could still be protected, where justified, but not acts that deny citizens their civil and constitutionaal rights.

What petitioner requests is a hearing on the merits of his case before a court of law. He wants the opportunity to present evidence of wrongdoing on the part of the IRS. The rulings of the Court of Appeals denies him those basic rights..

The decision below brings to a focus the conflict of rights between an aggrieved citizen and his government. It raises Constitutional due process questions concerning a citizen's

rights to the courts. Over the years this Court has clarified a citizen's due process rights vis-a-vis the courts.

For example, Chief Justice Berger's remarks contained in *Scheurer v. Rhodes,* 416 U.S. 232, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974):

> "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admission, its task is necessarily a limited one, the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely, but that is not the test. Moreover, it is well established that, in passing on the motion to dismiss, whether on the grounds of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader."

Further, the Court stated, citing *Conley v. Gibson,* 355 U.S. 41, 45-46, 2 L. Ed. 2d 78, 78 S. Ct. 49 (1957):

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

It is obvious that the case was dismissed without any testimony concerning Mr. Farkas' pro se complaint.

In *Bell v. Hood,* 327 U.S. 678 (1946) the Court recognized a long series of cases wherein courts awarded equitable relief

against government officials to remedy or enjoin conduct that would violate a provision of the Constitution. Therein it was stated that courts have been alert to adjust remedies to grant necessary relief where federal guaranteed rights have been improperly taken. *See also, Wilkey v. Sinkler,* 179 U.S. 58 (1900) and *Swafford v. Templeton,* 185 U.S. 487 (1902).

A more recent statement on the balancing of a citizen's rights against improper actions on the part of government agents is found in *Bivens v. Six Unidentified Agents of the Bureau of Narcotics,* 403 U.S. 388 (1971). There the Court found that a violation of the Fourth Amendment to the Constitution does give rise to a claim for civil damages.

The concurring opinion of Mr. Justice Harlan in *Bivens, supra,* at 403 U.S. 407 states:

> "These arguments for a more stringent test to govern the grant of damages in constitutional cases seems to be adequately answered by the point that the judiciary has a particular responsibility to issue the vindication of constitutional interests such as those embraced by the Fourth Amendment. To be sure, it must be remembered, that legislatures are the ultimate guardians of the liberty and welfare of the people in quite as great a degree as the courts. *Missouri, Kansas and Texas R. Co. v. May,* 194 U.S. 267, 270, 48 L. Ed. 971, 973, 24 S. Ct. 638 (1904). But it must also be recognized that the Bill of Rights is particularly intended to indicate the interests of the individual in the face of the popular will as expressed in legislative majorities."

The complaint of Mr. Farkas shows that at all times Mr. Elliot and Mr. Locraft were agents and employees of the Internal Revenue Service. The acts complained of amply

constitute violations of Mr. Farkas' constitutional and civil rights. To hold that the United States is absolutely immune from such outrageous actions creates a shield that robs litigants of due process.

Since the basic reason for immunity of the soverign is unwarranted interference with legitimate governmental activities, *Butz v. Economou,* 438 U.S. 478 (1978), the question is how does it benefit the people to bar them from litigating claims based on improper exercises of governmental functions. The Constitution is the supreme law of the land and governmental immunity must conform to the Constitutional guarantees of due process. Mr. Farkas' claim was for money damages and it has been recognized that, as opposed to specific relief against individual government officers, suits for damages do not involve any compulsion against the sovereign. *Larson v. Domestic and Foreign Commerce Commission,* 337 U.S. 682, 687 (1949). The Government should be bound by the improper acts of its agents and employees as much as any other.

Petitioner requests the Court to establish clearly the priority of rights between the Government and its agents and to allow Mr. Farkas to exercise his due process right to a trial on the merits.

Mr. Farkas requests the opportunity to offer evidence to substantiate his claims. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the law whenever he receives an injury." *Marbury v. Madison,* 1 Cranch 137, 163, 2 L. Ed. 60-69 (1803).

The claims against the individuals should not have been dismissed for failure of service.

The record is clear that the individual parties had notice of the claim against them, although no formal appearance on their part was noted. Their positions were ably represented both in the District Court and appellate level.

Respectfully submitted,

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CHARLES KUBINSKI
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APPENDIX

TITLE 42 UNITED STATES CODE SEC. 1985, 1986

42 U.S.C.:

§1985 [Revised Statutes, Sec. 1980] *Conspiracy to interfere with civil rights.*

* * *

(3) *Depriving persons of rights or privileges.*

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Title 42 United States Code Sec. 1985, 1986

§1986 [Revised Statutes, Sec. 1981] *Same; action for neglect to prevent.*

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

PLEADING IN UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT

District of Columbia

No. 79-1030

FRANK FARKAS
7801 Allentown Road
Oxon Hill, Md. 20022

Plaintiff

v.

UNITED STATES OF AMERICA

and

JEROME KURTZ
Commissioner of Internal Revenue
Internal Revenue Service
Washington, D.C.

and

HAROLD ELLIOT
Revenue Agent
Internal Revenue Service
Washington, D.C.

and

JAMES LOCROFT
Internal Revenue Service
Washington, D.C.

Defendants

Pleading in United States District Court

SUIT FOR DAMAGES

Jurisdiction is founded in this Court under the Civil Rights Act of 1971 — 42 U.S.C. 1985(3) and 1986 and the First, Fourth, Fifth, Eighth and Ninth Amendment of the Constitution of the United States of America.

1. Plaintiff is an adult, a citizen of the United States and of the State of Maryland. Defendant Kurtz is the Commissioner of the Internal Revenue Service and defendants Elliot and Locroft at the times complained of were employees of the Internal Revenue Service. Plaintiff states that the defendants conspired to deny him his civil rights.

2. During February 1974, various dates, defendant Elliott visited plaintiff and on the pretext of a civil audit removed various records which were the property of plaintiff, assuring plaintiff that the books and records would be returned to plaintiff intact.

3. Also during the same February 1974, defendant Elliot returned to Mr. Farkas and removed further records, covering 1972 business activities, giving the same assurances.

4. At no time were itemized receipts for these books and records given to plaintiff, nor was plaintiff advised that books and records were to be used to create a criminal case against him.

5. Upon request of the plaintiff for his records, it was first alleged that no records or documents had ever been removed from plaintiff. It was later stated by the Internal Revenue Service that records had been removed but that itemized receipts were not issued to plaintiff because he had not requested them. Later revisions were to the effect that a written receipt was not issued because it was not Mr. Elliott's position to issue them.

Pleading in United States District Court

6. As a result of this conspiracy and misuse, an indictment was returned against plaintiff using the "net worth" method. False and fraudulent testimony was then utilized in the attack against Mr. Farkas in court.

7. Plaintiff was unable to defend himself from these allegations since he did not possess the books and records necessary to do so.

8. Plaintiff was forced to plead guilty to a felony because the IRS had taken from him those documents that could exonerate him.

9. Plaintiff denies that he had ever owed any funds to the IRS and that he had properly filed a return for the above years.

10. As a result of the activities of the IRS, plaintiff was denied his civil rights, he was incarcerated, and lost his ability to earn a living.

Wherefore, the premises considered, plaintiff demands judgment against the defendants, each and all of them, in the amount of

1) $100,000 in compensatory damages.
2) $5,000,000 in punitive damages.
3) Such other and further relief as the Court deems proper.

Respectfully submitted,

s/ Frank Farkas
FRANK FARKAS

Plaintiff demands a trial by jury.

OPINION AND ORDER OF UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF COLUMBIA

FRANK FARKAS
7801 Allentown Road
Oxon Hill, Maryland 20022

Plaintiff

v.

UNITED STATES OF AMERICA

and

JEROME KURTZ
Commissioner of Internal Revenue
Internal Revenue Service
Washington, D.C. 20224

and

HOWELL ELLIOT
Revenue Agent
Internal Revenue Service
Washington, D.C. 20224

and

JAMES LOCRAFT
Internal Revenue Service
Washington, D.C. 20224

Defendants

Opinion and Order of United States District Court

ORDER

Upon consideration of Defendants' Motion to Dismiss, the Memorandum in Support thereof, any opposition thereto, and the entire record herein, it is by the Court this 29th day of June, 1979

ORDERED that Defendants' Motion to Dismiss be, and hereby is GRANTED and it is further

ORDERED that this action be and hereby is DISMISSED with prejudice.

UNITED STATES DISTRICT JUDGE

CIVIL ACTION NO. 79-1030

FILED
JUN 29 1979
JAMES F. DAVEY, Clerk

OPINION AND ORDER OF UNITED STATES COURT OF APPEALS FROM THE DISTRICT OF COLUMBIA CIRCUIT

NOT TO BE PUBLISHED — SEE LOCAL RULE 8(f)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

[No Opinion]

No. 79-1810 September Term, 1979

Civil Action No. 79-1030

FRANK FARKAS, Appellant

v.

UNITED STATES OF AMERICA *et al.*

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, Chief Judge, and WALD and MIKVA, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

The Government has not waived immunity and consented to be sued on the claims alleged in this case, and no personal service was made upon the individual appellees.

Opinion and Order of United States Court of Appeals for the District of Columbia Circuit

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this cause be, and the same is hereby, vacated.

It is FURTHER ORDERED and ADJUDGED by this court that this case be, and it is hereby, dismissed as to all appellees for the reasons stated herein.

Per Curiam

For the Court

s/ George A. Fisher
George A. Fisher
Clerk

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

FILED

JUN 4, 1980

GEORGE A. FISHER
Clerk

Supreme Court, U. S.
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No. 80-370

In the Supreme Court of the United States

OCTOBER TERM, 1980

FRANK FARKAS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner seeks review of the dismissal of his damage action against the United States and several Internal Revenue Service employees on the ground of sovereign immunity and because he failed to serve the complaint upon the individual named defendants.

The pertinent facts may be summarized as follows: On August 23, 1976, petitioner pleaded guilty to one count of willful evasion of his federal income taxes (Pet. App. 5a; A. A11-A12).[1] On April 11, 1979, petitioner filed this suit for damages in the United States District Court for the District of Columbia, naming as defendants the United States, the then-current Commissioner of Internal

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[1] "A." refers to the pages of the appendix filed by petitioner as an attachment to his brief in the court of appeals.

Revenue, and two Internal Revenue Service agents (Pet. App. 3a-5a). In his complaint, petitioner alleged that the defendants conspired to deny his civil rights. Specifically, petitioner charged that during the course of a tax audit, respondent IRS Agent Howell Elliott took possession of certain of his tax records, and that the IRS later refused to return the records to him for use in his defense against the tax evasion charges. Petitioner claims that the lack of the records resulted in his guilty plea (Pet. App. 4a-5a).

Pursuant to Fed. R. Civ. P. 12(b), respondents moved to dismiss the complaint on the grounds, *inter alia*, that the action was barred as against the United States by sovereign immunity, and that the individual defendants had not been properly served with process (A. A9-A25). The district court dismissed the suit with prejudice (Pet. App. 6a-7a). The court of appeals ordered that the suit be dismissed without prejudice. After noting that the government had not waived its sovereign immunity and that no personal service of the complaint had been made on the individual defendants, the court of appeals vacated the judgment of the district court dismissing the suit with prejudice but simultaneously entered its own order dismissing the suit without prejudice (Pet. App. 8a-9a).

1. The court of appeals correctly dismissed without prejudice petitioner's suit for damages. Petitioner challenges (Pet. 2-5) the dismissal of his suit against the United States on the ground of sovereign immunity. But it is well established that the United States may not be sued without its consent, for absent such consent no court has subject matter jurisdiction over such a suit. *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 141-142 (1972); *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *United States* v. *Shaw*, 309 U.S. 495, 500-501 (1940). By

statute, the United States has waived its immunity and consented to be sued for certain specific classes of claims. See *United States* v. *Shaw*, *supra*, 309 U.S. at 500-501. Such a waiver, however, cannot be implied, but must be unequivocally expressed. *United States* v. *King*, 395 U.S. 1, 4 (1969). Petitioner failed even to allege the existence of such a waiver applicable to this action. The court of appeals therefore properly dismissed his suit.

Given the long and consistent history of the doctrine of sovereign immunity, petitioner cannot argue that the doctrine violates his right to due process. *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Bell* v. *Hood*, 327 U.S. 678 (1946); *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971); and *Butz* v. *Economou*, 438 U.S. 478 (1978), upon which petitioner relies (Pet. 3-5), are distinguishable actions against individual officials for "bad faith" wrongdoing. They do not stand for the proposition that damage actions may be taken against the United States itself for such acts.

2. The court of appeals likewise correctly dismissed petitioner's suit against the individual respondents because he failed to serve his complaint on them. Rules 4(d)(1) and (d)(5) Fed. R. Civ. P. require that defendants in this type of action be served personally, whether or not they are being sued in their individual or official capacities. The district court was therefore without jurisdiction over the individual defendants. *Griffith* v. *Nixon*, 518 F. 2d 1195, 1196 (2d Cir.) cert. denied, 423 U.S. 995 (1975); *Rabiolo* v. *Weinstein*, 357 F. 2d 167, 168 (7th Cir. 1966), cert. denied, 391 U.S. 923 (1968); *Wallach* v. *Cannon*, 357 F. 2d 557, 558-559 (8th Cir. 1966). Since it is undisputed that petitioner failed to serve the individual defendants, dismissal of the complaint was proper whether or not they had actual notice of the suit. *Tart* v. *Hudgins*, 58 F.R.D. 116, 117 (M.D. N.C. 1972).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1980

DOJ-1980-10